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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL WIGLE,

Petitioner,

v.

CITY OF DETROIT,
DETROIT POLICE DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

- AND APPENDIX -

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July 30, 1991

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QUESTIONS PRESENTED

I.

WHERE COMMANDING OFFICERS REPEATEDLY RAISED CONCERNS REGARDING LACK OF SUPERVISION IN CROWD CONTROL SITUATIONS DURING THE 1984 BASEBALL PLAY-OFFS AND WORLD SERIES, IS THE CITY'S FAILURE TO PROVIDE ADEQUATE SUPERVISION OF POLICE OFFICERS IN THE FACE OF AN OBVIOUS NEED TO DO SO, AN ACTIONABLE POLICY OR CUSTOM CREATING LIABILITY UNDER 42 U.S.C. § 1983, WHERE AN INNOCENT BYSTANDER WAS BEATEN ON THE HEAD BY AN UNSUPERVISED AND UNTRAINED POLICE OFFICER?

II.

WHERE THE MICHIGAN COURT OF APPEALS AGREED THAT DETROIT POLICE RESERVISTS WERE UNTRAINED IN THE USE OF RIOT BATONS, IS THE PETITIONER WHO WAS STRUCK ON THE HEAD WITH A RIOT BATON, ARGUABLY BY A RESERVIST, LEGALLY BARRED FROM ASSERTING A CLAIM BASED UPON CUSTOM OR POLICY BECAUSE THAT RESERVIST WAS "SUPERVISED" INSTEAD?

III.

WHEN A POLICE OFFICER UNLAWFULLY INJURES A PERSON WHO CANNOT IDENTIFY, NOR REASONABLY BE EXPECTED TO IDENTIFY, THAT POLICE OFFICER, SHOULD THE CITY BE LIABLE FOR THE POLICE OFFICER'S CONSTITUTIONAL TORT UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR*?

IV.

HAS A CITY PRACTICED A POLICY OR CUSTOM ACTIONABLE UNDER 42 U.S.C. § 1983 WHERE IT RATIFIED THAT UNCONSTITUTIONAL CONDUCT OF ITS POLICE FORCE PRAISING THE CONDUCT OF ITS POLICE AND FAILING TO REASONABLY INVESTIGATE ALLEGATIONS OF MISCONDUCT?

LIST OF PARTIES

The Petitioner in this Court is Michael Wigle, who was the plaintiff in the proceedings below. The Respondent is the City of Detroit, Michigan.

Petitioner, Michael Wigle, asks this Court to issue a Writ of Certiorari to review the Decision of the Michigan Court of Appeals entered on January 9, 1990. Petitioner sought leave to appeal to the Michigan Supreme Court, which was denied on January 29, 1991, and Petitioner's Motion to Reconsider the Michigan Supreme Court's Order Denying Leave to Appeal was denied on May 7, 1991.

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In The

Supreme Court of the United States

October Term, 1991

MICHAEL WIGLE,

Petitioner,

v.

CITY OF DETROIT,
DETROIT POLICE DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner MICHAEL WIGLE respectfully prays that a writ of certiorari issue to review the Order of the Supreme Court of the State of Michigan denying Petitioner's Motion for Reconsideration, entered on May 7, 1991, from the Decision of the Michigan Supreme Court entered on January 29, 1991, which had denied Petitioner's delayed Application for Leave to Appeal.

OPINIONS BELOW

The Decision of the Michigan Court of Appeals, No. 112648, 1/9/90, is now reported. It is reprinted in the appendix hereto. (A-1)

The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is reported at 437 Mich. 894 (1991) and is reprinted in the appendix hereto. (A-4)

The Order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration of the Order

Denying Leave to Appeal is not yet reported. It is reprinted in the appendix hereto. (A-5)

JURISDICTION

The Michigan Supreme Court entered its Order denying Petitioner's Motion for Reconsideration, on May 7, 1991. This petition is filed within 90 days of that Order.

The jurisdiction of this Court to review the Order of the Michigan Supreme Court and the Decision of the Michigan Court of Appeals is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which reads in relevant part:

> Every person who, under color of any statute, ordinance, custom or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On October 14, 1984, an unidentified City of Detroit police officer beat Petitioner Michael Wigle unconscious with a riot baton. The beating occurred outside Tiger Stadium in Detroit, Michigan, following the Tigers' World Series victory.

Near the end of the final game of the series, a crowd of thousands gathered outside Tiger Stadium to celebrate the victory. Mr. Wigle, who lived nearby, decided to join the celebration. Mr. Wigle walked slowly and used a cane because of a prior car accident.

As Mr. Wigle stood in the crowd outside Tiger Stadium, he noticed a small group becoming boisterous and rowdy. He concluded that trouble was possible, so he began trying to thread his way through the crowd to go home. Before he was able to go very far, Mr. Wigle observed a phalanx of police on foot and horseback sweeping toward him through the crowd. He saw that the foot officers had riot batons, and that some of these officers were striking people on the head and shoulders. Before he could move, a line or phalanx of police officers were upon him.

Mr. Wigle observed a number of officers in that phalanx strike other persons in the crowd above the shoulders with riot batons, a practice which all the commanding and supervising officers agree would be clearly violative of constitutional rights. One officer told him to get out of the way. Mr. Wigle explained that he was trying, but that he had to move slowly because of his injuries. The officer replied, "That's your fucking problem." The officer then raised his riot baton above his head and beat Mr. Wigle on the head and back. He blacked out.

The phalanx of police which swept down on Mr. Wigle included both reserve and regular police officers. All of the reserves were on foot, and many had riot batons. The reserves were not trained to use riot batons, nor were they trained in crowd control techniques. Many of these reserves were not supervised that night nor throughout the World Series. Many of the regular officers were also unsupervised. Yet, as a high-ranking police official testified, the type of injuries Mr. Wigle suffered become likely when the police are not supervised.

After the World Series victory, the media reported that innocent citizens had been beaten with riot batons by the police that night. The City also received complaints of police misconduct during the victory celebration. Yet, then-City of Detroit Police Chief William Hart stated that his department did a "fabulous" job and that he had no criticism of his department's conduct that night. The police investigated the citizen complaints received, but refused to state whether sanctions or discipline resulted.

When it became evident in 1984 that the Detroit Tigers would play in the American League playoffs and possibly the World Series, the Chief of Police ordered supervisory and commanding officers to form a special policy-making task force to oversee problems which could arise in the course of the playoffs. During the American League playoffs, supervising and commanding officers of the Respondent complained to the task force that supervision of crowd control was inadequate; and that it could and would lead to additional problems during the World Series. There was also testimony that, on the day of Mr. Wigle's beating, there was a serious absence of supervision outside of Tiger Stadium, which was made known to commanding officers in the course of the ballgame.

Mr. Wigle sued the City of Detroit under 42 U.S.C. § 1983 for the violations of his right not to be deprived of liberty without due process under the 14th Amendment to the United States Constitution. He also sued under a common law claim based upon vicarious liability for assault. He asserted that these violations resulted from deliberately indifferent policies or practices of the City of Detroit which included the City's failure to supervise and train its police in crowd control activities and authorizing or sanctioning the beatings which Mr. Wigle and others suffered.

Despite the City's answer to interrogatories stating that there were reports, critiques or evaluations written regarding the Department's performance during the playoffs, it came to light (just one week before the trial court granted summary disposition) that all of the supervisors had prepared such reports which were deliberately concealed from the Petitioner. Clearly these reports could and would have been subpoenaed at trial. Given the evidence generated on discovery, the evidence both as to custom or policy as well as ratification was ample.

On October 3, 1988, Respondent's Motion for Summary Disposition was granted by the trial court. Petitioner appealed to the Michigan Court of Appeals, which upheld the trial court. In its decision issued January 9, 1990, the Court of Appeals erroneously made findings of fact, concluding that Petitioner had no claim under § 1983 because he was struck by a trained and supervised police officer whether regular or reserve. The Court also held that the City did not ratify the misconduct of its police because complaints were investigated. Petitioner sought leave to appeal to the Michigan Supreme Court, which was denied on January 29, 1991. Petitioner then made a Motion for Reconsideration of the January 29 Order, which was denied on May 7, 1991.

It is also noteworthy that both the trial court and the Michigan Court of Appeals ruled that due to governmental immunity, the City of Detroit could not be sued vicariously. Michigan Compiled Law 691.1407. Since the officer who assaulted Mr. Wigle was unidentified, no case could be brought against an individual Defendant. Consequently, aside from his claim under 42 U.S.C. § 1983, Mr. Wigle is without a remedy.

REASONS FOR GRANTING THE WRIT

Summary Of Reasons

While this Court has held that inadequate supervision and training may under limited circumstances, form the basis for § 1983 liability, only the issue of training has, to a degree, been addressed by this Court. Inadequate supervision has not been defined. Such definition is needed and compels this Court's attention.

The Opinion below states that the duty to provide adequate training can be obviated by providing supervision instead. Such confusion also compels this Court's attention.

There is a need to reconsider the application of *respondeat superior* to § 1983 cases. A limited application is appropriate where it is impossible to identify the individual tortfeasor. Given the intent of Congress in passing the Ku Klux Klan Act of 1871, to provide a remedy to victims of constitutional malfeasance, this statute abhors the complete denial of a remedy to persons such as the Petitioner.

Finally, this case provides an opportunity to consider and explicate the doctrine of ratification, as evidence of custom or policy, within the meaning of *Monell v New York City Dept. of Social Services*, 436 U.S. 658 (1978).

I.

A CITY'S FAILURE TO SUPERVISE ITS POLICE, WHEN THERE IS AN OBVIOUS NEED FOR SUPERVISION, IS AN INDEPENDENT POLICY OR CUSTOM UNDER 42 U.S.C. § 1983.

The severe beating and resulting injuries Mr. Wigle suffered at the hands of a City of Detroit police reservist or officer demonstrate the need for close police supervision by a city in situations such as crowd control. The City's failure to closely supervise its police in tense or difficult circum-

stances such as these, virtually guaranteed that constitutional deprivations, such as those Mr. Wigle suffered, would occur. High-level department commanders and supervisors recognized that close supervision was both needed and absent during the crowd control operations, not only that night but for weeks prior thereto. The City's failure to supervise its police, particularly its reservists who, in addition to not being supervised, were also not trained in crowd control procedures or the use of riot batons, led directly to the violations of Mr. Wigle's constitutional right to be free from deprivations of his liberty and bodily security.

A. The Importance Of The Issue

The facts of this case establish that a city's failure to supervise its police is a custom or policy which is independent of the adequacy of its training programs. Where the police are attempting to control a large crowd or are engaged in other similarly demanding activities, such as hostage rescue, even superb training will not be enough standing alone. Thorough supervision is also essential to prevent violations of constitutional rights, especially the use of excessive force.

In *City of Canton, Ohio* v *Harris*, 489 U.S. 381 (1989), this Court held that a city's failure to train its police is an actionable custom or policy under § 1983 where the failure to train demonstrates deliberate indifference to constitutional deprivations. Writing for the Court, Justice White explained the meaning of "deliberate indifference":

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy is likely to result in the violation of constitutional rights, that the policymakers of the city

> can reasonably be said to have been deliberately indifferent to the need.
>
> *Id* at 390 (footnote omitted).

This Court further held that for liability to attach against a city, the plaintiff must show that the training was inadequate "in relation to the tasks the particular officers must perform," and show that the particular training deficiency actually caused her injuries. *Id* at 390-91.

Justice White addressed only the failure to train as a basis of municipal liability, and did not define applicable standards where there is a claimed failure to supervise. *See* Note, "§ 1983 Authorizes Municipal Liability for Failure to Train Employees in Limited Circumstances," 20 Seton Hall LR 886, 909 (1990). Justice O'Connor, in her partial concurrence, referred briefly to the failure to supervise as a basis for municipal liability, citing *Wellington* v *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983), but did not state whether she viewed the failure to supervise as an *independent* basis for municipal liability rather than a corollary to the failure to train, 489 U.S. at 398.

Similarly, the lower courts have not typically viewed the failure to supervise as a theory of § 1983 municipal liability which is distinct from the failure to train. *See*, e.g. *Kerr* v *City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989); *Parker* v *Dist. of Columbia*, 850 F.2d 708 (D.C. Cir. 1988), *cert. den'd.* 109 S.Ct. 1339 (1989); *Tanner* v *Heise*, 879 F.2d 572 (9th Cir. 1989). *But see*, *Harris* v *City of Pagedale*, 821 F.2d 499, 508 (8th Cir.), *cert. den'd.* 484 U.S. 986 (1987) (Failure to supervise where known misconduct inevitably results in continuing misconduct); *Bergquist* v *County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986) (Failure to train *or* supervise actionable under § 1983); *Leach* v *Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989), *cert. den'd.* 110 S.Ct. 2173 (1990).

The circumstances under which Mr. Wigle suffered constitutional deprivation demonstrate that this Court must recognize that a city's deliberately indifferent failure to supervise its police officers is a basis for § 1983 liability *independent* of the adequacy of a city's training program. City policymakers know "to a moral certainty," *Harris*, 489 U.S. at 390, n. 10, that their police force will be required to engage in crowd control maneuvers from time to time. Where the crowd is large and enthusiastic, as it was on the night Mr. Wigle was injured, it is inevitable that some individuals in that crowd will be rowdy and hostile to the police. This makes tight discipline and close supervision essential.

Yet, supervision problems were well recognized within the World Series Task Force. For weeks it had been known that the area outside the ballpark was a potential powder keg which required extensive precautions. Commanding officers in the police department who were assigned to the Series Task Force had initially recommended that the area outside the stadium be cleared within a one-block radius. When that did not happen, they expressed concern that there were insufficient numbers of officers and supervisors outside the stadium to deal with problems which could arise. Furthermore, it was noted that the police officers and supervisors who were stationed outside the stadium were routinely leaving their posts and disappearing. It was suspected that there was an ongoing systematic abandonment of duty to watch the ballgames. Despite continuing complaints about this situation, the problem continued throughout the games of both series.

Such a failure to rectify a problem can constitute a basis for municipal liability. *City of Canton, Ohio* v *Harris*, *supra*. Furthermore, the World Series Task Force was given policymaking authority. However, given that members of the Task Force including the Deputy Chief, the second highest-

ranking official in the Department, were complaining about lack of supervision it is reasonable to infer for purposes of deciding a motion for summary disposition, that the failure to correct an identified problem, likely to result in a violation of constitutional rights, was a failure by the Chief of Police or others to whom "(a)uthority to make municipal policy . . . (has been) delegated," said person or persons having "final policymaking authority." *Pembaur* v *City of Cincinnati*, 475 U.S. 469 at 483 (1986).

Deposition testimony made clear the need for close supervision. Leading officers within the department recognize that a crowd such as this would contain mostly innocent celebrants like Mr. Wigle. However, unsupervised it is likely that the police will feel threatened by the size of the crowd or the hostility of some within it, and so be compelled toward the use of excessive force to move or disperse the crowd. Such a result may occur *even though* the officers are trained in crowd control, because of the pressures involved. But if police officers are closely supervised and know it, they will be far more likely to check their impulses. As a high-ranking Detroit police official recognized, inadequate supervision makes constitutional deprivations likely when the police face difficult circumstances such as these. That same official observed that many Detroit police reservists and officers were unsupervised throughout the World Series playoffs. Thus, the City of Detroit's failure to supervise its police in pressured circumstances such as these, constituted a sufficiently articulated claim of deliberate indifference to constitutional violations, creating liability under § 1983 to withstand a motion for summary disposition. This Court should grant certiorari to clarify that a city's deliberately indifferent failure to supervise is an actionable policy under § 1983, regardless of the adequacy of training, thus clarifying *Harris*.

B. The Michigan Court Of Appeals Disregarded *City of Canton, Ohio* v *Harris*.

This case was appealed to the Michigan Court of Appeals from a grant of summary disposition by the trial court under Michigan Court Rule 2.116(c)(10), no genuine issue of material fact. That rule is substantially similar to FRCP 56. Under Michigan law, the Court of Appeals had an obligation to draw all reasonable inferences in Mr. Wigle's favor and to be liberal in determining whether there were genuine issues of fact for trial by viewing all facts in a light most favorable to him. Unless it would be impossible for Wigle to support his claims at trial, due to some deficiency which cannot be overcome, the trial court should have been reversed. *Rizzo* v *Kretschmer*, 389 Mich 363 (1973). This is not a case which comes to this Court "after a full trial during which the . . . (Petitioner) purchased numerous theories of municipal liability . . ." including inadequate supervision. Nor did Petitioner have "every opportunity . . . to address the type of proof necessary to satisfy the deliberate indifference standard . . .". *City of Canton, Ohio, supra*, at 394 (O'Connor, J., dissenting).

The Court instead made inappropriate findings of fact. It erroneously concluded that Mr. Wigle was struck by a highly trained and supervised regular police officer, and that any reservists in the line of police that swept down upon Mr. Wigle were also supervised. However, high-level police officers present that night testified in deposition that reserve police officers, who were not trained to use riot batons, were in that line of police. Other Detroit police officers testified that numerous reserve officers were not supervised on the night Mr. Wigle was injured.[1]

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[1] Perhaps the strongest example of the way in which the Michigan Court of Appeals played fast and loose with the facts, concerns the issue of supervision. The opinion states as follows:

(*concluded on page 12*)

Furthermore, Mr. Wigle's testimony, standing alone, raised sufficient evidence of systematic and indiscriminate use of riot batons above the shoulders of persons innocently caught in the crowd to generate a reasonable infer-

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(*continued from page 11*)

> "In any event, having reviewed the deposition testimony, it appears that plaintiff was struck by the on-foot officers which were first in line. These officers were highly trained and supervised."

In fact there is a fair inference from the deposition testimony that this is not the case at all. Former police inspector Isaiah McKinnon was third in command of the World Series police task force. He was present the night of the beating. His testimony is as follows:

> Q. (By Mr. Goodman, continuing): Do you have an opinion, based upon what you observed out in the vicinity of Tiger Stadium that evening, whether such a situation could have occurred that police officers were walking in line and hitting a citizen or citizens with these batons?
>
> * * *
>
> A. It's quite possible. I think it was — it's not possible that it happened in the intersection of Trumbull and Michigan, because we spent a lot of time there. But it's possible.
>
> Q. And what, in your opinion, when you say it's possible would have been the reason that such an incident could have occurred based upon your observations of the police officers that night and the way in which they were supervised?
>
> MR. ROBBINS: Objection, calls for speculation.
>
> MR. GOODMAN: Can he answer?
>
> Q. (By Mr. Goodman, continuing): Go ahead.
>
> A. I can speak specifically for tactical services section, and I know that my people were closely monitored and closely supervised. And I think my supervisor, who was there, can speak for my people, also. Of course, I can't speak for the other people who were there. I did see officers who were not supervised. I saw reservists who were not supervised. It's possible that this happened. And for whatever might be the reason, if people are unsupervised, things like that can occur.
>
> (McKinnon deposition, pp 70-73).

Admittedly, the witness states that he doesn't think such an incident could have occurred at the location at which Petitioner testified it did occur. However, taking McKinnon's testimony in combination with Mr. Wigle's, the Court of Appeals was incorrect. There indeed was a factual basis for the claim that Mr. Wigle was beaten by an unsupervised and untrained officer at the intersection of Michigan and Trumbull.

ence of lack of supervision and lack of training. Indeed, Wigle testified that before he was struck on the head by a riot baton, he could see numerous instances of other officers in the same phalanx doing exactly the same thing to others. Such evidence has been held to constitute sufficient evidence of custom or policy. *Grandstaff* v *City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. den'd.* 480 U.S. 917.

Had the Court of Appeals viewed the facts in the light most favorable to Petitioner, as it was obligated to do, the Court would have properly applied *City of Canton, Ohio* v *Harris*, *supra*, and recognized that the standards set out in *Harris* are satisfied in the present case. In *Harris*, this Court held that a city's failure to train its police is an actionable policy under § 1983 where the failure to train demonstrates deliberate indifference to constitutional deprivation, and the failure to train caused the plaintiff's harm. The Court explained that deliberate indifference will arise where "in light of the duties assigned to specific officers, the need for more or different training is so obvious, and the inadequacy [is] so likely to result in the violation of constitutional rights." *City of Canton, Ohio* v *Harris*, *supra* at 390.

Assuming this Court intended *Harris* to also apply to a city's failure to supervise, these standards are met. Clearly, crowd control is one of the specific duties assigned to police, especially reserve officers. In a situation requiring the control of a large and sometimes boisterous crowd, where the police find it necessary to use riot batons, inadequate supervision is "likely to result in the violation of constitutional rights," because the police will be too tempted to use their batons improperly. Such a result is especially likely where untrained reserve police are given riot batons and sent into the crowd. Crowd control is one of the "usual and recurring situations with which [police] must deal."

A city's failure to supervise its police in such circumstances, knowing the pressures involved, demonstrates

deliberate indifference to the constitutional rights of its citizens, and makes deprivations virtually certain to occur, just as they did for Mr. Wigle. The Michigan Court of Appeals thus disregarded the clear mandate of *Harris*.

II.

THE MICHIGAN COURT OF APPEALS HAS PERVERTED THIS COURT'S OPINION IN *CITY OF CANTON, OHIO* v *HARRIS* BY IMPLICITLY HOLDING THAT LACK OF TRAINING IS NOT ACTIONABLE WHEN THE UNTRAINED OFFICER IS SUPERVISED.

Mr. Wigle was not able to determine whether his assailant was a regular Detroit police officer or a reservist. However, there was considerable testimony that regular officers had two things that reservists did not: 1.) training; and 2.) supervision.[2] Some of the commanding supervisors have testified that a riot baton should *never* be used above the shoulders and regular police officers are so trained.

Other commanders have testified that there may be limited discretion regarding the use of these batons. Regardless, all the witnesses agree that the riot batons should *never* be used to strike people in order to clear a crowd; and *never* for such purposes, above the shoulder. All regular police officers are so trained. Reservists were not.

There is evidence that the phalanxes of foot officers at the location where Mr. Wigle was beaten consisted of reservists. Since reservists were equipped with riot batons and that they were untrained regarding the use of these riot batons, it can be reasonably inferred that the officer who struck Mr. Wigle was a reservist.

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[2] Some of the witnesses have indicated that only reservists were unsupervised; others have testified that there were both reservists and regular officers who were unsupervised.

In *City of Canton, Ohio* v *Harris, supra*, this Court said "that the inadequacy of police training may serve as the basis for § 1983 liability . . ." *Id* at 388. The Michigan Court of Appeals, however, held that "even if plaintiff were struck by a reservist in line, that (untrained) reservist would have been supervised. Hence, we believe that the circuit court properly granted defendant's motion."

Thus, the Michigan Court of Appeals has construed the obligation to provide adequate training regarding constitutionally sensitive conduct to be extinguished by sufficient supervision. Assuming *arguendo*, that supervision in a crowd control situation may be sufficient, it is more likely to monitor misconduct, *ex post facto*, and thereby, over a long period of time, train by example. To argue that supervision, in a single instance, can replace training is as illogical, as evidence of a single act of misconduct is to show a custom or policy of inadequate training. *Oklahoma City* v *Tuttle*, 471 U.S. 808 (1985).

The Opinion below demonstrates the need for further explication of the inadequate training or supervision bases for § 1983 liability under *Monell*. Obviously, the Michigan courts simply do not comprehend the doctrine. This circumstance favors a grant of certiorari.

III.

WHERE RESPONDENT'S CLEARLY UNCONSTITUTIONAL ACT BY AN UNIDENTIFIABLE POLICE OFFICER RESULTS IN SERIOUS INJURY, 42 U.S.C. § 1983 SHOULD IMPOSE MUNICIPAL LIABILITY BASED UPON *RESPONDEAT SUPERIOR*.

This is a situation where it is virtually impossible for Mr. Wigle to identify his assailant other than by that assailant's employer. After the assault, Mr. Wigle was unconscious for perhaps hours. When he was finally able to drag himself

into a hospital emergency room he immediately reported having been beaten by an unidentified police officer. His story to this day has remained unchanged.

Petitioner is well aware that this Court has rejected a blanket imposition of vicarious liability under 42 U.S.C. § 1983. *Monell* v *New York City Dept. of Social Services*, 436 U.S. 658 (1978). The case for *respondeat superior* has been mounted by Justice Stevens in dissent in *Oklahoma City* v *Tuttle*, 472 U.S. 808, 835-840 (1985) and again, in concurrence, in *Pembaur* v *City of Cincinnati*, *supra*, 487-490. These arguments have not been adopted by a majority.

Yet the circumstances of this case argue for a limited-imposition *respondeat superior*. There is no remedy under state law, due to governmental immunity. Where there is simply no way for Mr. Wigle to know who beat him but no question that his assailant was employed and "supervised" by the City, why should the City not be forced to adopt the action of the anonymous police officer as its own? As this Court has noted, there are times at which it is impossible to distinguish between the actions of individuals and the actions of municipalities for purposes of *Monell* liability. *Pembaur* v *City of Cincinnati*, *supra*. The policy behind that recognition logically demands that, under the limited circumstance where an active wrongdoer cannot be individually identified, his conduct should be adjudged to be the conduct of a municipality as well.

IV.

A CITY HAS PRACTICED A POLICY OR CUSTOM ACTIONABLE UNDER § 1983 WHERE IT RATIFIES UNCONSTITUTIONAL CONDUCT BY ITS POLICE.

Mr. Wigle and other innocent citizens in the crowd were beaten by Detroit police officers on the night of the World Series victory. These beatings were reported extensively by

the media, and the City received citizen complaints of police misconduct. Yet, then-Police Chief William Hart had no criticism whatsoever of police conduct on that night, saying instead that the police did a "fabulous" job. Although the City asserted that all citizen complaints were investigated, the City did not demonstrate that such investigations were thorough rather than cursory, nor did the City show that it took any disciplinary action. Through its failures to criticize or discipline those Detroit police officers who unconstitutionally beat innocent citizens, it ratified this misconduct.

A. The Importance Of The Issue

In *Monell* v *New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that a city is liable under 42 U.S.C. § 1983, for constitutional deprivations only where the deprivation results from a city's custom or policy. In general, a city is not liable under *respondeat superior* merely because one of its employees commits a constitutional tort. *Id* at 694. But where a city adopts or ratifies constitutional deprivations, then such deprivations become city policy or custom. When a city's policy-making officials proclaim that unconstitutional police misconduct is acceptable, either by endorsing the misconduct or failing to discipline, the city is sending a clear message to its police and citizens. That message is that such misconduct is a course of action approved by the city and adopted as its own.

Under such circumstances, police misconduct becomes city policy or custom. It is policy, in that the city has consciously adopted it, and it is custom, in that the city has proclaimed that it will acquiesce in or permit such misconduct to continue. Thus, a city's ratification of police misconduct establishes a custom or policy creating § 1983 liability because it shows that such misconduct is not isolated or random, but rather occurs with express authoriza-

tion by the city. Police officers will know that they may continue to deprive citizens of constitutional rights without fear of retribution.

B. The Michigan Court of Appeals' Decision Is In Conflict With Decisions Of The Fifth And Sixth Circuits.

In *Grandstaff* v *City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. den'd.* 480 U.S. 917, plaintiff sued the city under § 1983 after the police mistook her decedent for a fugitive and killed him. The Court upheld the jury's finding that the police violated decedent's 14th Amendment rights when they used deadly force with conscious disregard for the risk of harm to innocent third parties. The Court upheld that the city was liable for this constitutional deprivation because it ratified the conduct of the police:

> The disposition of the policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymakers, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made
>
> 767 F.2d at 171.

In *Marchese* v *Lucas*, 758 F.2d 181 (6th Cir. 1985), *cert. den'd.* 489 U.S. 916, plaintiff sued Wayne County, Mich-

igan, under § 1983 after he was severely beaten while in custody. The Court held the County liable where its Sheriff failed to conduct a serious investigation, or sanction those involved, because the Court concluded that the failure to investigate or sanction constituted an official County policy of ratifying unconstitutional acts.

These decisions conflict directly with the Michigan Court of Appeals' conclusion that the City of Detroit did not ratify the beatings which occurred after the World Series victory because it "investigated" citizens' complaints. Superficial investigations, coupled with Chief Hart's approval of the misconduct of the police and no imposition of discipline, demonstrate that the City practiced a policy tolerating such misconduct though ratification.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

GOODMAN, EDEN,
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DATED: July 30, 1991

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

(State of Michigan — Court of Appeals)

(Filed January 9, 1990)

(MICHAEL WIGLE, Plaintiff-Appellant, v CITY OF DETROIT and DETROIT POLICE DEPARTMENT, Defendants-Appellees – No. 112648)

Before: Griffin, P.J., and Gillis and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff claims that an unidentified city of Detroit police officer struck him on the head with a riot baton following the final game of the 1984 World Series. Plaintiff sued, alleging that defendants violated his constitutional rights and that they were liable for the unidentified officer's assault.

Defendants moved for summary disposition, claiming that governmental immunity barred plaintiff's state tort claims and that plaintiff's 42 USC 1983 claim was deficient because defendants had an express policy against using a riot baton as it was used on plaintiff. The circuit court granted defendants' motion.

Plaintiff first claims that defendants should be held liable for the acts of the unidentified officer, alleging that their acts were *ultra vires*. We disagree. Defendants were engaged in a governmental function and their acts did not become *ultra vires* merely because plaintiff's assailant's identity was

unknown. *Ross* v *Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). Moreover, to the extent that plaintiff seeks to impose *respondeat superior* liability on defendants, we believe that summary disposition was properly granted. *Lowery* v *Dep't of Corrections*, 146 Mich App 342, 356-357; 380 NW2d 99 (1985), lv den 425 Mich 870 (1986).

Plaintiff next argues that there was sufficient evidence to support his 42 USC 1983 claim. Defendants had an official written policy prohibiting the use of a riot baton in the manner described by plaintiff. Plaintiff nonetheless claims that officers had discretion in determining when to strike individuals with the batons. Having reviewed the deposition testimony, we believe that such discretion could be exercised only where the officer was threatened with bodily harm. Plaintiff testified that he was merely attempting to comply with an officer's order to move when he was struck and, therefore, the officer's actions would have been in violation of defendants' express policy.

Plaintiff also claims that defendants sent untrained and unsupervised reservists into the streets with riot batons. Plaintiff concedes that he cannot identify the officer who struck him as being a reservist. In any event, having reviewed the deposition testimony, it appeared plaintiff was struck by the on-foot officers which were first in line. These officers were highly trained and supervised. Moreover, even if plaintiff were struck by a reservist in line, that reservist would have been supervised. Hence, we believe that the circuit court properly granted defendants' motion.

Plaintiff further argues that defendants ratified such actions by its officers by failing to investigate or chide officers for this behavior. Defendants' answers to interrogatories indicate that individual complaints were investigated. Moreover, as noted above, while there were situations in which an officer could use his riot baton in the manner described by plaintiff, this was not such a situation.

Finally, plaintiff contends that defendants failed to disclose critiques prepared by various supervisory personnel in response to his interrogatories which would have supported his 42 USC 1983 claim. Plaintiff learned that the critiques existed one day before the motion for summary disposition was heard. Plaintiff noted the existence of critiques during oral argument before the circuit court. Oral argument on the motion was continued the following week. Plaintiff never presented the critiques to the circuit court and he certainly had sufficient opportunity to depose the supervisory officers as to defendants' allegedly inadequate handling of crowd control. Hence, we decline plaintiff's invitation to reverse the circuit court's decision on evidence which was not presented to it.

Affirmed.

/s/ Richard Allen Griffin
/s/ John H. Gillis
/s/ David H. Sawyer

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered January 29, 1991)

(MICHAEL WIGLE, Plaintiff-Appellant, v CITY OF DETROIT and DETROIT POLICE DEPARTMENT, Defendant-Appellee – SC: 88982; COA: 112648; LC: 85 521 715 NO)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(*Certification Omitted*)

ORDER DENYING RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered May 7, 1991)

(MICHAEL WIGLE, Plaintiff-Appellant, v CITY OF DETROIT and DETROIT POLICE DEPARTMENT, Defendant-Appellee – SC: 88982; COA: 112648; LC: 85 521 715 NO)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of January 29, 1991 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)